IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 11 OF 2006
WITH
CONFIRMATION CASE NO. 1 OF 2005

Sarvanand @ Soiru Gaonkar
s/o. Purso Gaonkar, 35 years
Occ. Labour, H. No. 65, Basrai,
Khaddem, Quepem, Goa. ..... Appellant

V e r s u s

State of Goa
(Through the Public Prosecutor
High Court). ..... Respondent

Mrs. Shanti Maria Fonseca, Advocate U/LAS for the Appellant.

Ms. Winnie Coutinho, Public Prosecutor for the Respondent.

CORAM: ***J. N. PATEL,***
N. A. BRITTO, J.J.

DATE: ***28th November, 2006.***

JUDGMENT (Per N. A. BRITTO, J.)

This appeal is by the accused who has been convicted and sentenced, inter alia, to suffer death penalty under Section 302 I.P.C. by Judgment dated 19.11.2005 of the learned Additional Sessions Judge, Margao.

2. As far as confirming the said death penalty is concerned, the learned Public Prosecutor has submitted, and in our view rightly, that the case does not call for the imposition of extreme penalty of death.

3. The accused was charged and tried under Sections 302, 392 I.P.C. and has been convicted and sentenced under Section 302 and 379 I.P.C. Under Section 302 I.P.C., in addition to the death penalty, the accused was sentenced to pay fine of Rs.25,000/- and in default to undergo RI for two years and under Section 379 I.P.C., the accused was sentenced to undergo RI for two years.

4. The undisputed facts are as follows:

Raya Datta Fal Dessai, aged 65 years and his wife Smt. Saraswati @ Shantu Fal Dessai, aged 60 years, popularly known as 'Dada' and 'Ayee' respectively, (and we shall refer to them as such, herein after), were residing in an isolated house situated in a cashew grove in a forest area belonging to Manvar Audi, surveyed under nos. 30/1 and 32/1, situated in Village Tiloy, Fatorpa of Quepem Taluka. The said Dada had a stone quarry situated near the stone quarry of Srinivas/Pw1 and both the quarries are also situated in a forest area. The distance between both the quarries is about 400 metres and both the quarries are situated at a distance of about ten minutes walk from the house of Dada and Ayee. They had three sons including Surendra/Pw2, who is unmarried, but all of them were residing elsewhere.

5. Dada was known to always wear a gold chain/exhibit 2-A, with a locket of Lord Ganesha/exhibit-2 and a bracelet/exhibit 20-A, having his name written on it while Ayee always used to wear a gold mangalsutra, earrings and a nose pin. Dada was a hot headed person and was a money lender of the locality. Dada used to run a distillery and also sell liquor in the said house and a lot of truck drivers used to come there to consume liquor so much so that Pw14/Shyamrao consumed lot of liquor on the fateful day of the incident and had slept in the verandah of his house till about 6.30 p.m. and returned to his hut near the quarries and again went back at about 7.30 p.m. when he saw Ayee lying with her face to the ground lying near the lime tree away from their house with bleeding injuries and when he called her, all that she answered was “hoo” and he called out to Dada but he was not found and as he was returning to his hut near the stone quarry, he met Dada's supervisor/mukaddam Pw13/Daku, who was informed about Ayee lying near the house and they returned back to the place and, thereafter, they informed P.w.1/Srinivas, a relation of the said Dada, and he in turn went to Balli in Fatorpa to the house of Narendra Fal Dessai, the son of Dada, and returned along with him to the scene where they saw the dead bodies of both the deceased lying on the ground with bleeding injuries and thereafter Pw1/Srinivas went to Cuncolim Police Station and lodged his complaint at about 21.15 hours, which was registered as Crime No.39/04 under Section 302 I.P.C. against unknown person and the Investigation

Officer PI Dessai/P.w.20 came to the scene and found that the body of the deceased Dada was in the courtyard while that of Ayee was near the lime tree with stab injuries. It appears that a dog squad was called but the dog gave no clue whatsoever to the IO and after photographs were taken and the position of the dead bodies was marked in the presence of P.w.12/Mandar and one Mohan, the dead bodies were removed for post mortem examination. It appears that the services of the finger print expert were also secured but he too could not provide any clue to the I.O.

6. The dead bodies were taken to the morgue of Hospicio Hospital at Margao at about 3.00 a.m. On 29.06.2004 autopsies were conducted on the said dead bodies by P.w.10/Dr. Pujari. At about 8.00 a.m. on 29.06.2004, a panchanama was conducted in the presence of P.w.12/Mandar and during the course of the said panchanama, three shirt buttons namely exhibits 3, 4 and 9 were found near the place where the dead bodies of the said Dada and Ayee were found and so also the locket with Lord Ganesha/Exhibit 2 was also found amongst other articles. The dead body of Dada was found at a distance of about 3.60 metres in the courtyard in front of the house while that of Ayee was found at a distance of about 18 metres near the lime tree from the body of Dada. The inquest panchanama was carried out in the presence of Pw12/Mandar and one Ashindra in the Hospicio hospital at about 13.00 hours on 29.06.2004. The autopsies were conducted by Pw10/Dr. Pujari at about 2.15 p.m.

7. As per Pw10/Dr. Pujari, there were as many as 29 injuries on the body of Ayee which included several incised wounds, incised stab wounds and contusions which have been described by him in detail on page 4 of the autopsy report/exhibit 28. As per him, all the injuries were fresh at the time of death and injuries nos. 16, 17, 18, 20, 22, 25, 26, 27, 28 and 29, along with internal injuries, were individually sufficient to cause death while all the injuries were collectively sufficient to cause death in the ordinary course of nature. Pw10/Dr. Pujari opined that the cause of death of Ayee was due to haemorrhage and shock due to damage to multiple vital organs caused by sharp and blunt weapons. As per him, injury no.16 was a incised stab wound with clear cut margins, obliquely on the abdomen on the left side and this injury was 4 cms in length, one cm in breadth and had pierced the liver and the interior surface of the stomach and the depth of the injury was 10 to 12 cms. Injury no.17 was also a incised stab wound, on the left abdomen and this injury had damaged the spleen from the upper border. Injury no. 18 was also a incised stabbed wound on the left of the abdomen and it had damaged the front of the spleen and left kidney.

8. Pw10/Dr. Pujari, also found 15 wounds on the dead body of Dada which were fresh at the time of death. He has described the said injuries and as per him, the external injuries nos. 3, 4, 6, 7, 8 and 9 were sufficient to cause death individually and all the injuries were sufficient to cause death in the ordinary course

of nature. As per him, the death of Dada was due to haemorrhage and shock due to the damage to the liver, spleen, left kidney, intestine by sharp edged weapon. Pw10/Dr. Pujari was shown an implement which has been referred to as a sickle/Exhibit 19, which admittedly, is not an implement used commonly in this State. The said sickle has a steel blade and sharpness of the blade is not on the inner (concave) aspect but on the outer (convex) aspect. According to him, injuries nos. 1, 14 and 15 on the dead body of Ayee, could have been caused by the wooden handle portion of the sickle, which is hard and blunt object and the remaining injuries could have been caused by the said sickle with the angular blade portion penetrating the body. Likewise, Pw10/Dr. Pujari opined that all the fifteen injuries on the dead body of Dada, could have been caused by the said sickle. In fact, there was no dispute that the death of both Dada and Ayee was homicidal in nature. The question was as to who was the author of the said injuries?

9. The case of the prosecution is based on circumstantial evidence.

10. Prosecution had examined 21 witnesses in support of its case whilst the accused chose to examine himself in support of his defence. We asked the learned Public Prosecutor as to what made PI Dessai/Pw20 to arrest the accused or why needle of suspicion was pointed out to him but she has not been able to provide any answer, much less a satisfactory answer. As per Pw19/Subash, he had seen the

accused near the huts near the stone quarry at about 6.45 p.m. on 28.06.2004 when he was about to leave the quarry. His statement was recorded on 04.07.2004 and yet the accused was not suspected. He claims that when he saw the dead bodies he had noticed that the gold chain and gold bracelet were missing. Yet Section 392 I.P.C. was not added to the crime registered u/s. 302 I.P.C. The accused was arrested on 06.07.2004. The statement of the wife of the accused was recorded on the next day i.e. on 07.07.2004. When P.I. Dessai/Pw20 was asked, he stated that on his interrogation of the wife of the accused, he came to know that the accused was on enemical terms with Dada as the accused suspected that Dada was having illicit relations with the wife of the accused. In other words, the involvement of the accused in the crime could not be suspected prior to 07.07.2004 and therefore the statement of P.I. Dessai/Pw20 that they were in search of the accused from 04.07.2004 cannot be accepted. The prosecution has not specifically alleged any motive for the crime allegedly committed by the accused and this aspect does not appear to have been considered in detail by the learned trial Court except to say that the evidence of Pw6/Swati had gone unchallenged. The learned trial Court ought to have closely scrutinised her evidence considering that her relations with the accused were strained. That there was no elaborate cross-examination of most of the prosecution witnesses is another matter.

11. As per the prosecution, the motive for the murder of both the deceased

by the accused was due to the fact that Dada had illicit relations with the wife of the accused and to prove the same, the prosecution examined no other witness but his wife the said Pw6/Swati and their daughter Pw7/Sapna, aged about 12 years. Admittedly, the accused was separated from his wife and was not residing with her and their three children for atleast 4½ years, as stated by him. There is no dispute that the accused was doing fishing on a canoe at Palolem, Canacona. As per Pw7/Sapna, about seven days prior to the death of the said Dada and Ayee, one day, her father, the accused, came and inquired about her mother and told her to inform her mother not to plant chillies near the house of Dada or else he would hit her and also to tell her mother that he would come on the following Saturday and that she should wait for him. Pw6/Swati was sometimes working at the house of the deceased, as stated by her and she also used to cultivate chillies near the house of the deceased but she was not the only person but there were several other women who were also cultivating chillies there. As per Pw6/Swati, the accused had come to her house about eight days prior to the murder, in her absence, when she had gone for work and met her daughter Pw7/Sapna. According to her, the accused had kept a message with her daughter that she should not go to the house of Dada and that somebody would kill Dada and the blame would come on her and had also told her daughter that if she went to the house of Dada, he would teach her a lesson. Admittedly, if at all accused went to her house, she did not meet him. She could not have come to know more than what the accused had told her daughter. What has

been stated by Pw6/Swati, has not been at all corroborated by Pw7/Sapna. Pw6/Swati has stated that she was not having any illicit relations with Dada and has further stated that for about two to three months, she had not visited the house of Dada, and if that is so, Pw6/Swati's version that the accused had threatened her to teach a lesson, could not have been accepted. The motive for the alleged crime has not been convincingly proved by the prosecution.

12. The learned trial Court ought to have scrutinised the evidence of Pw6/Swati more closely considering that she had strained relationship with the accused. Her evidence was not at all supported by Pw7/Sapna, her daughter and it appears that there was no love lost between them, though theirs was a love marriage as she had not visited the accused even once after he was arrested. If they were separated for 4½ years and as stated by her, and she was disowned by the accused, we do not see any reason why the accused ought to have visited her and told her that he would teach a lesson to her in case she went to the house of Dada and we also fail to understand that in case the accused threatened her to teach her lesson, why the accused should have taught a lesson to both the deceased when she had already stopped going to the house of the deceased, about three months previously. Motive, as stated by the Apex Court in the case of ***Sahadevan v. State (2003 (1) S.C.C. 534),*** would not hamper conviction if the circumstances relied upon by the prosecution are proved beyond doubt. There is no doubt that motive is always relevant and bears a

special significance in cases which are based on circumstantial evidence. Absence of motive does not weaken a case but its existence certainly strengthens the case and it assumes significance when there is a doubt. It may be of no consequence if the evidence is strong but in a case of this nature where the evidence is very weak, as we shall see a little later, the motive was of special significance to the prosecution and the prosecution having alleged it but having failed to prove the same, certainly it does break one link in the chain of circumstances.

13. The next circumstance sought to be proved by the prosecution is that the accused was seen near the quarry at about 6.30 p.m. on 28.06.2004. As regards this aspect, Pw19/Subhash has stated that he had gone to the stone quarry and at that time, he saw the accused who is a resident of Basrai (in Village Balli) and at about 6.45 p.m., when he was about to leave the stone quarry, he saw the accused near the huts of the labourers, and at that time, he was wearing a white colour short pant and a long sleeves greenish colour short pant and was having a white colour towel on his shoulder. One does not know as to what happened to the said white colour towel, assuming Pw19/Subhash had really seen the accused prior to the commission of murders. However, it is interesting to note that the statement of this witness was recorded on 04.07.2004 prior to the arrest of the accused on 06.07.2004. The fact that the accused was seen by Pw19/Subhash near the stone quarry, could not connect the accused with the murder of any of the deceased. This circumstance is of no

assistance to the case of the prosecution. It is not the case of the prosecution that the accused and any of the deceased were last seen together. It is only then that the accused might have been expected to offer an explanation.

14. The next circumstance is that the accused was found with blood stained pant/Exh.17 when he was arrested. P.w.20/P.I. Dessai stated that he effected the arrest of the accused on 06.07.2004 and at that time, the accused was found having old and partly healed injuries on his face. As per him, after his arrest on 06.07.2004, a panchanama was drawn and the white short pant/Exh.17 worn by the accused was attached. Pw16/Sashank is the witness for the said panchanama. He stated that a person apprehended by the police was produced before them on 06.07.2004 and he was wearing a short pant of white colour and a blue shirt with white and yellow checks. As per him, some reddish spot like blood was seen on the said short pant. According to him, the accused had injuries on his face, nose, forehead, lips, right hand thumb and so on and when the accused was questioned as to the said injuries, he could not give any answers as the accused was nervous and the said short pant was removed and was handed over to them. On the same aspect, Pw21/H.C. Narulkar has stated that when the accused was asked about healed injuries, the accused had told them that he had sustained the injuries while ploughing the field, when a bullock kicked him. P.w.16/Sashank, has not stated as to at what time, the panchanama of attachment of the short pant/exhibit 17, was done on 06.07.2004 and

in fact he has admitted that he did not know how long before he reached the Police Station, the accused was brought at the Police Station. Apparently, Pw16/Sashank was also not told as to what time, the accused was arrested and that was the least expected from PI Dessai when he called Pw16/Sashank to witness the panchanama of the seizure of the pant of the accused. It appears that the accused was arrested at 7.00 a.m. as stated by Pw21/Head Constable Narulkar and if one goes by the panchanama/exhibit 42, it appears that it was apparently made at about 9.00 a.m. and thus it appears that the accused was in police custody for about two hours prior to the said attachment and, in such a situation, any finding of blood of which group is unknown, would not carry much conviction. The said short pant was sent to C.F.S.L. and the report shows that human blood was detected on it but its blood group could not be ascertained. As already stated, in the absence of the blood group being determined and the presence of the injuries found on the accused himself, it could not be said that the blood found on exhibit 17/short pant, was that of any of the deceased. Moreover, it is to be noted that it is difficult to accept that the accused would have been wearing the same white short pant for nearly eight days and if he had hidden his shirt, to which we shall refer to a little later, we are unable to find any reason why he would not have hidden his white pant. The Apex Court, in a slightly different context, observed in ***Yamanappa Goolappa Shirgumpi & 3 ors. v. State of Karnataka (1981 S.C.C,. (Cri) 271),*** that when the accused had appeared before the police, as a innocent person, he would not have done so after wearing blood stained

clothes so as to entangle himself in a murder case especially when he had sufficient time to destroy the clothes or the stains of blood on them. In the case of ***Khalil Khan v. State of Madhya Pradesh (AIR 2003 S.C. 4670)*** the incident had taken place on 6.4.86 and the accused was arrested on 11.04.1986, nearly four days thereafter and the Hon'ble Supreme Court observed that they found it extremely difficult to believe that a person who is involved in such a serious crime, like murder, would still be wearing clothes which are blood stained even four days after the murder which fact they found was opposed to normal human conduct. It is to be noted that Exh.17 is a pant of white colour and any blood on it the accused himself would have seen for eight days he was wearing and would not have remained wearing the same pant till he was arrested. In our view, from whatever angle one looks at it, the fact that some blood stains were found on the short pant worn by the accused would not connect the accused with the alleged crime in the overall circumstances of the case.

15. The recovery of the chain/exhibit 2A and the bracelet/exhibit 20 A is another circumstance by which the prosecution has sought to connect the accused with the alleged crimes. As per Pw2/P.I. Dessai, on 12.07.2004, the accused volunteered to make a further disclosure statement and pursuant to it, the accused led them near the house of the deceased at Tiloy and from the heap of sand, he removed one polythene bag containing one gold chain and one gold bracelet and to

support the said recovery, prosecution has examined Pw17/Narayan, who has stated that the accused told them that he would show the bracelet and the chain, which he had hidden in the sand at Tiloy. According to him, the accused led them to the house of the deceased after walking a distance of about eight minutes, stating that it was the house of the deceased (Rayu Fal Dessai) and then led them to a distance of about twelve minutes from the house towards the north and pointed out one heap of sand covered with palm leaves and then lifted the dried palm leaves and shifted the sand with his right hand removed the polythene bag, which was buried one foot deep in the sand and from the bag removed the gold chain/exhibit 2A, and the bracelet with letters Rayu F.D./exhibit 20 A.

16. Admittedly, the deceased had a gold finger ring, which was not touched by the accused, so also the locket which had fallen on the ground. Similarly, the accused had not taken away the mangalsutra, the nose ring and the earrings from the body of Ayee, which ornaments were removed and handed over to Ulhas Fal Dessai, a relative of the deceased, at the time of the panchanama. The accused similarly had not taken cash of Rs.1,82,328/-, which was found in the drawers of the table and cash of Rs.60,395/- and four gold bangles which were found in the cupboard and which were again given to the said Ulhas Fal Dessai. The learned Trial Court had rightly observed that the motive of the accused in committing the murders was not to commit the theft, nor in order to commit the theft and if that is so, one fails to

understand as to why the accused had to remove only two ornaments namely the chain and the bracelet and hide them of all places near the house of he deceased and not anywhere else. This has also to be seen in the background of the fact that according to the prosecution the accused carried the sickle to his house walking a distance of about 10 kms. This recovery appears to be of doubtful character, apart from the fact that it was allegedly made after six days of the arrest of the accused. The delay in recovery certainly diminishes the value to be attached to it. This has been held by two Division Benches of this Court. First, in the case of ***Ahmed@ Ahmed Chakri & Ors. v. State of Maharashtra (1994 Cr.L.J.) 274),*** which was followed in the unreported decision of this Court dated 07.08.2006, in ***Shiri @ Shrikant Gaunkar v. State of Goa (Cr.A. no. 26/2005)***. This circumstance, therefore, appears to be of doubtful character as it is difficult to believe that the accused would have left cash and other ornaments untouched and would remove only two ornaments and keep them buried near the very house of the deceased which otherwise would not have been very easily accessible for him. In our view, this circumstance is not proved as free from doubt.

17. The next recovery sought to be proved by the prosecution is of the shirt/exhibit 18, which according to the I.O. Shri Dessai, was done on 09.07.2004, on the basis of the information given by the accused and to support the same, Pw15/Prashant, was examined. As per Pw15/Prashant, on 09.07.2004, PI Shri

Dessai had requested him to act as a pancha and the accused stated before them he would show them the bushirt and one sickle which he had hidden and told them that he had kept the bushirt at his house, and accordingly, led them to Basrai Village to one house and the accused after going to the said house, the accused took out a long sleeve greenish colour shirt, the three buttons of which were missing. The said shirt was having white colour stripes and there appeared to be blood stains on the said shirt and the right hand side long sleeves was having reddish stains. He has identified the said shirt/M.O.18, as the said shirt. There were six buttons of this shirt, which were missing and one does not know as to what happened to the other three buttons but the prosecution with a view to explain that the three buttons found at the scene were the buttons of this shirt, had sent the said buttons and the shirt for the examination of C.F.S.L. The report of C.F.S.L. produced by the prosecution shows that the buttons found at the scene namely exhibits 3, 4 and 9 are similar to the buttons of the shirt/exhibit 18. The C.F.S.L. report also shows that the broken threads from the buttons in exhibits 3, 4 and 9, were found to be similar to the button stitching threads of the shirt in exhibit 18 and the broken threads were also similar to the remaining of the stitching threads of the front three missing buttons of the shirt/exhibit 18. As far as the said three buttons exhibit 3, 4 and 9 being found at the scene, in our view, this is a weak circumstance to connect the accused with the crimes. As far as the blood stains on the shirt is concerned, the C.F.S.L. report shows that human blood was detected on the same but its group could not be

determined and considering that the accused had injuries as well, the blood stains found on the said shirt could not be said to be any of the deceased, to connect the accused with the alleged crimes. The prosecution has not been able to give any plausible explanation as to why the accused should have continued to wear a white pant/Exhibit 17 for eight days if it had blood stains but conceal the greenish colour shirt/Exhibit 18, on which blood would not be easily seen. Considering the nature of injuries of both the deceased, not only the shirt/exhibit 18, but also the pant/exhibit 16, ought to have been filled with blood but that is not the case of the prosecution since it has not been stated either by Pw16/Sashank nor by Pw19/Subhash that there were any sizeable stains of blood on them. As far as the exhibit 19/sickle is concerned, the blood group on the same could not be detected. As per Pw15/Prashant, after the attachment of the shirt, they came and sat back in the jeep and then proceeded as per the direction given by the accused and then the accused led them to one cattle shed located on the left had side of the katcha road at a distance of about 30 metres as one proceeds to the highway road and then the accused entered the cattle shed and climbed on top of the loft and produced one sickle type sharp weapon having a wooden handle and green colour iron ring above the wooden handle of which the wooden handle was 12 cms and the iron blade was 35 cms and the width of the blade was 4 cms. The said sickle was placed in a polythene bag and was sealed in their presence. Admittedly, the accused was residing at Basrai, which is stated to be at a distance of about 10 kms from the house

of the deceased, by road and by short cut, at a distance of about 2½ kms through the forest. This distance as per P.w.19/Subhash, is about 3½ kms from the house of the deceased. We are unable to understand as to why the accused had to carry the said sickle all the way to his house and hide the same and kept it hidden till it was allegedly recovered by the police, if the accused had time to put the ornaments in a polythene bag and bury them in the sand near the house of the deceased. The learned trial Court has stated that the accused might have carried the said sickle with a view to protect himself as he had to go through the forest but we are not impressed with the said explanation. It is difficult to believe that in case the accused had committed the murders with the said sickle, the accused would have carried the said sickle all the way along with him to a distance of about 10 kms and kept it hidden as stated on behalf of the prosecution. This recovery is also not free from doubt.

18. That takes us to last circumstance and that is as regards the extra judicial confession having been made to Pw10/Pujari. As per Pw21/Head Constable Narulkar, who had initially arrested the accused, the accused had explained to him that the injuries on him were caused while he was ploughing the field and when the bullock had kicked him. The accused was taken to Pw9/Dr. Verenkar and the accused had not given any explanation as to the cause of injuries to her when he was examined by her on 06.07.2004. As per Pw9/Dr. Verenkar, the accused was having multiple abrasions on the right side of the face, on the forehead, on the nose,

lacerations on the lip and above the lip and abrasions on the right pinna, on the posterior aspect, and on the right thumb and a incised wound on the right finger and as per her, the said injuries were seven to eight days old. If P.w.9/Dr. Verenkar had confirmed that the injuries were seven to eight days old, it certainly not the case of PI Shri Dessai that he was unsatisfied with the said opinion and another opinion was required to be obtained from the Medico Legal Officer Pw10/Dr. Pujari. From the typewritten letter by PI Dessai to Pw10/Dr. Pujari, it appears that initially PI Dessai wanted to know the opinion as regards the duration of the injuries sustained by the accused but that part of the letter was struck off and in addition Pw10/Pujari was also asked to opine about the duration of the injuries in addition to ascertaining the blood group and taking the nail clipping and scalp hair of the accused. Pw10/Dr. Pujari stated that he had asked the accused as to how he sustained the injuries on his body and according to him, the accused gave a history that he had a scuffle with the deceased Dada, etc. Thereafter, Pw10/Dr. Pujari recorded, what is said to have been stated by the accused to him as follows:

> "I asked the accused how he had sustained the injuries on his body and he gave me the history that he had a scuffle with the deceased Rayu on 28.06.2004, at about 6.30 p.m. to 7.00 p.m. at Tiloy, Vantem, where the deceased scolded and assaulted the accused with a wooden plank on the face and nose. He stated to me that thereafter he assaulted Rayu with a sickle type weapon

> with a wooden handle and caused multiple injuries. He had stated to me that thereafter he assaulted the wife of the deceased Rayu i.e. Smt. Saraswati @ Shantu, with the same weapon, during which, he the accused, sustained injuries on the face, forehead, lips, nose, near alla of the nostrils and incised wound on the right ring of the finger at the P.I.P joints abrasion and a blackish scab and loosened fallings from the pheriphynx. The laceration near the right alla of nostrils were infected. The incised wounds on the right ring finger had abrasion of healing. The age of the injuries on the accused was consistent with the history of the scuffle on 28.06.2004."

19. What the Hon'ble Supreme Court had held in ***Ammini & Ors. v. State of Kerala (AIR 1988 S.C. 260)***, was that an admission to a Doctor was admissible in evidence as an admission was not hit by any provisions of the Evidence Act. However, it can be seen from what has been recorded by Pw10/Dr. Pujari, is nothing but a wholesale confession made by the accused to him and, that too under suspicious circumstances and, at a time when PI Dessai was standing outside the room where the accused was examined by Pw10/Pujari. Section 26 of the Evidence Act, 1872, clearly prohibits that no confession made by any person whilst he is in the custody of a Police Officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person. Admittedly, no confessional statement of the accused was recorded as required under Section 164 of the Code

and it has been conceded by Pw20/PI Dessai that although the accused had shown his willingness to give a confessional statement, the accused declined to give such a statement once he was sent to Judicial Custody. However, the controversy does not end there. Pw10/Dr. Pujari recorded the said extra judicial confession in English. He was asked as to in what language the accused had given the said history and Dr. Pujari stated that the accused had given him the said history in Konkanni or Marathi language or in both. It is nobody's case that Pw10/Dr. Pujari was conversant in Konkanni language and if he did not know whether the accused spoke to him in Konkannu or Marathi, it is difficult to accept whether the language spoken by the accused was rightly understood by Dr. Pujari and translated by him into English. As already stated, P.w.9/Dr. Verenkar, had already opined as regards the age of the injuries on the person of the accused and there was no question of sending the accused again to Pw10/Dr. Pujari to ascertain the age of the said injuries. It appears that the accused was taken to Dr. Pujari with a view to get his confessional statement recorded since PI Dessai had failed to get any such statement recorded from P.w.9/Dr. Verenkar and he standing outside, got the said confessional statement recorded by Pw10/Dr. Pujari and in such a situation and in the light of the prohibition referred to hereinbefore, the said statement of the accused, which amounts to a confession could not have been accepted as a circumstance and connect the accused to the alleged crimes. Considering the facts of the case, the recording of the said statement by Dr. Pujari, is not free from suspicion. We find that the

protection afforded by the wholesome provisions of Section 25 and 26 was sought to be whittled down by the I.O. by his ingenuity by sending the accused to Pw10/Dr. Pujari after he failed to get what he wanted from Pw9/Dr. Verenkar.

20. The volume of evidence produced by the prosecution is regarding the identification of ornaments as those belonging to Dada and we propose not to refer to this evidence.

21. The tests required to be met before an accused is held guilty in a case based on circumstantial evidence, have been set out by the Supreme Court in the case of ***Sharad B. Sharada v. State of Maharashtra (1984 (4) S.C.C. 116)***, but we do not propose to reproduce them herein. In a case based on circumstantial evidence, all the circumstances sought to be proved must first be proved beyond reasonable doubt and after the same are proved, they must be inevitably and exclusively point out to the guilt of the accused and therefore shall not be any circumstance which may reasonably considered consistent with the innocence of the accused and the Court is required to see the cumulative effect on the circumstances proved in a given case. The circumstances proved must also be such that they cannot be explained on any other hypothesis except the guilt of the accused and they should be of an incriminating character. We have already concluded that the circumstances referred to hereinabove and sought to be proved were not free from doubt to connect the

accused in a serious offence of murder. We must note that more serious is the offence, the higher degree of proof is necessary before a person is convicted. The irresistible inference of the above discussion is that the prosecution has lamentably failed to prove its case beyond reasonable doubt.

22. We are therefore, inclined to give benefit of doubt to the accused.

23. As a result, we allow the appeal, set aside the Judgment Order of the learned Additional Sessions Judge and acquit the accused under Section 302 and 379 I.P.C. The accused shall be set to liberty in case he is not required in any other case.

J. N. PATEL, J.

N. A. BRITTO, J.

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